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THE LAST SHOULD BE FIRST—FLIP THE ORDER OF THE *CHEVRON* TWO-STEP

Richard Murphy*

One can almost see the Justices knocking their heads with the heels of their hands, looking for the means to express their sense of the proper allocation of decisionmaking authority [between agencies and courts].¹

So—so if you want to go into the *Chevron* Step Zero or Step Minus Alpha 13.6, I mean, fine. [Laughter from the Supreme Court gallery]²

INTRODUCTION

The most recent Supreme Court term marked the appearance of yet another major case on the applicability of the (in)famous *Chevron* doctrine, *City of Arlington v. FCC*.³ The question presented was whether *Chevron* deference should apply to an agency's construction of its own jurisdiction.⁴ The very existence of this question was a reminder of the embarrassing tendency of deference doctrine toward complexity. It seems harder than it should be. Compounding the embarrassment, gathering empirical evidence suggests that it may not matter too much whether the courts purport to apply weak or strong forms of review of agency actions—courts affirm agency outcomes at about the same rate either way.⁵

* AT&T Professor of Law, Texas Tech University School of Law. This Article was written for a symposium held to honor the memory of the late Professor Charles Koch, a leading scholar of administrative law for decades. Professor Koch's career was an inspiring example of how a great law professor can combine academic and professional engagement. He authored scholarly works that deepen our understanding of the law; wrote many volumes of treatises that provide clear and accurate guidance to the bench and bar; and developed an innovative, problem-driven casebook for teaching Administrative Law—one of the most challenging courses of the law school curriculum. I had the privilege of working with Professor Koch after he invited me to join him and Professor William Jordan as a co-editor of the casebook. It was an honor to do so and a terrific learning experience. Many thanks to the *William & Mary Bill of Rights Journal* and the Institute for Bill of Rights Law for organizing an excellent event in Professor Koch's honor.

¹ Charles H. Koch, *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 993 (2006).

² Transcript of Oral Argument at 6, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1547), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1545.pdf (recording comment by Justice Breyer). The laughter that followed Justice Breyer's remark proves that the *Chevron* doctrine is funny. *Id.*

³ 133 S. Ct. 1863 (2013).

⁴ *Id.* at 1867–68.

⁵ See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (collecting studies on affirmance rates; observing,

To many in the administrative law community, deference doctrine nonetheless seems important. There is, of course, the never-ending supply of article fodder it supplies.⁶ More creditably, there is a sense that it is important to think about deference doctrine the right way because it expresses something fundamental about separation of powers and the proper roles of courts and agencies. An ideal deference doctrine would express this relation in a simple, compelling way. The *Chevron* doctrine has failed to do so—even though rivers of academic and judicial ink have flowed on the subject.⁷

The late Professor Charles Koch pointed the way to a better, clearer *Chevron* doctrine.⁸ As Charles saw it, this doctrine should not be regarded as an earthshaking “counter-*Marbury* for the administrative state.”⁹ Rather, it is a clumsy application to

“[w]ith one notable exception, the studies suggest that a court’s choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts”); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 174–75 (2010) (collecting studies showing that agencies win in court about sixty to seventy percent of the time, regardless of ostensible standard of review).

⁶ Cf. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting) (commenting that the Court’s decision on the relation of *Chevron* to stare decisis created “a wonderful new world . . . full of promise for administrative-law professors in need of tenure articles.”). For a tenure article on this very issue published shortly before Justice Scalia’s remark, see Richard W. Murphy, *A “New” Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004) [hereinafter Murphy, *A “New” Counter-Marbury*].

⁷ The literature is vast. For a sampling of recent works, see Kenneth A. Bamberger & Peter L. Strauss, *Chevron’s Two Steps*, 95 VA. L. REV. 611 (2009); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271 (2008); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273 (2011) [hereinafter Seidenfeld, *Chevron’s Foundation*]; Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); Peter L. Strauss, *“Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143 (2012) [hereinafter Strauss, *“Deference” Is Too Confusing*]. For a somewhat older but leading work on the puzzles created by *Chevron*, see especially Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (identifying fourteen then-unanswered questions concerning the applicability and effect of the *Chevron* doctrine).

⁸ Professor Koch would have denied this characterization and insisted that he only sought to remind people of an approach long followed by the bench’s leading lights of administrative law. See Koch, *supra* note 1, at 993 (observing that “judicial review law would gain substantial clarity” were it to follow the lead of Judges McGowan, Leventhal, Tamm, and Bazelon of the D.C. Circuit). But if something has been forgotten long enough, finding and reminding can amount to much the same thing.

⁹ Cf., e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990) (citation omitted) (“*Chevron* promises to be a pillar in administrative law for many years to come. It has become a kind of *Marbury*, or counter-*Marbury*, for the administrative state.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))).

statutory construction of two old, familiar ideas in administrative law: Courts are in charge of the law; agencies are in charge of policymaking within their respective spheres of authority.¹⁰ Statutory construction of agency enabling acts lies at the contested boundary between these two ideas. Our legal system's default position is that statutory construction presents issues of law that courts control—they are in charge of “say[ing] what the law is.”¹¹ *Chevron* recognized, however, that as agencies give operative meaning to vague statutes, they often must make subsidiary policy choices “to fill . . . gap[s] left . . . by Congress.”¹² Insofar as the process of statutory construction depends on these agency policy choices, the principle of judicial deference to agency policymaking should apply to it. Thus, an agency's reasoned policy analysis provides a good reason for courts to apply a deferential standard of review to an agency's statutory construction.

Suppose that one wished to characterize the preceding analysis as a logically ordered “two-step” that courts might generally apply when reviewing an agency's construction of a statute that it administers. It might run like this: First, has the agency offered a reasoned justification explaining why its preferred statutory construction would generate beneficial policy effects? If not, then *Chevron* deference, as such, does not apply.¹³ If the agency has offered a reasonable policy explanation, then the reviewing court should affirm the agency's statutory construction so long as it is consistent with a reasonable understanding of Congress's instructions.¹⁴ Ordered this way, the *Chevron* two-step would fit neatly into a simple model of the pragmatic pre-*Chevron* regime for judicial deference. On this approach, a reviewing court first checks whether there is some special reason to trust an agency's judgment. If there is, then the court applies a deferential standard of review; if not, the court “says what the law is” by adopting the statutory construction it deems best.¹⁵

Those with a passing familiarity with administrative law know that the *Chevron* doctrine, whatever its merits, is not known for its simplicity.¹⁶ They also know that the two-step just described runs in the opposite order of the Supreme Court's framework, which inquires at its step one “whether Congress has directly spoken to the precise

¹⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (characterizing ambiguity in an agency statute as an implicit delegation of policymaking authority).

¹¹ *Marbury*, 5 U.S. (1 Cranch) at 177.

¹² *Chevron*, 467 U.S. at 843.

¹³ Other grounds for deference might apply, however. See *infra* Part I.B (discussing long-standing judicial practice of extending strong deference to long-standing agency statutory constructions).

¹⁴ Cf. *Chevron*, 467 U.S. at 843 n.9 (instructing courts to use the “traditional tools of statutory construction” to determine clear statutory meaning).

¹⁵ See generally *infra* Part I.B.

¹⁶ See generally, e.g., Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007).

question at issue”¹⁷ and waits until step two to assess whether an agency had a reasoned explanation for its choice.¹⁸ Thus, a deference doctrine rooted in respect for agency policymaking purports to *end* with review of agency explanations rather than *start* with them.

This odd ordering has contributed to *Chevron* confusion, unmooring the doctrine from its core insight that courts handle law and agencies handle policy. More particularly, it has spurred development of *Chevron*’s “step zero,” which asks needlessly confusing questions regarding the eligibility of agency statutory constructions for *Chevron* deference.¹⁹ It also encourages courts to engage in potentially counter-productive inquiries at step one as to whether a statute leaves room for deference before asking whether the agency has done anything to deserve it.²⁰

There is a straightforward way to eliminate this confusion, make the *Chevron* doctrine easy, and fit it neatly into preexisting deference doctrine: reverse the order of the steps.²¹ The best justification for *Chevron* deference is agency policymaking competence,²² so a court reviewing a plausible agency statutory construction should first inquire if the agency has in fact deployed that competence. If it has, then *Chevron*’s strong deference is in order, and the court should affirm if the agency’s statutory construction is reasonable. *Chevron* really should be that simple.

A roadmap: To embed *Chevron* in its larger milieu, Part I will briefly highlight certain aspects of pre-*Chevron* deference doctrine.²³ Part II will discuss *Chevron* itself as

¹⁷ *Chevron*, 467 U.S. at 842.

¹⁸ *Id.* at 843; *see also* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (noting that *Chevron* step two is just a name for arbitrary-and-capricious review as applied to statutory construction); *Chevron*, 467 U.S. at 864–66 (canvassing policy arguments in favor of the EPA’s statutory construction near the end of the *Chevron* opinion). For early discussions of the role of policy review at step two, see Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994) [hereinafter Seidenfeld, *A Syncopated Chevron*].

¹⁹ *See infra* Part II.B.1. For an insightful essay exploring the relation between *Chevron*’s step two and its unfortunate step zero, see especially William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 727–30 (2002) (contending that treating step two as a form of hard-look review would eliminate the need for confusing step-zero inquiries regarding which types of agency informal statutory interpretations warrant strong deference).

²⁰ *See infra* Part II.B.2.

²¹ For an example of a Supreme Court opinion that essentially reversed the *Chevron* two-step, see *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 90–100 (2007) (assessing agency policy justifications before turning to the statute’s “literal language”). Six concurring and dissenting Justices joined opinions disapproving this move. *Id.* at 107 (Kennedy, J., concurring) (expressing concern that reversing the two-step would give too much weight to agency policy concerns at the expense of traditional tools of statutory construction); *id.* at 108–09 (Scalia, J., dissenting) (describing the lead opinion’s structure as “a most suspicious order of proceeding”); *see infra* Part III.B (discussing *Zuni* at more length).

²² *Chevron*, 467 U.S. at 844–45.

²³ *See infra* Part I.

well as some of the more notable “step-zero” cases that try to set boundaries around the doctrine’s applicability.²⁴ Part III will argue that a reversed two-step would eliminate much of the confusion associated with the *Chevron* doctrine’s current form while retaining basic virtues of respect for agency expertise and adaptability to changing circumstances.²⁵ And the Conclusion, naturally, provides some final thoughts.

I. PRE-*CHEVRON* DEFERENCE TO AGENCY STATUTORY CONSTRUCTIONS AND APPLICATIONS

Notwithstanding any *Marbury* power to “say what the law is,”²⁶ American courts have frequently declared over the past couple of hundred years that they should give special weight to agency statutory constructions.²⁷ Courts based deference not on some overarching theory, but on an “eclectic cluster of considerations” that they applied flexibly and pragmatically—or sometimes ignored.²⁸

For the present purpose, two important themes pop out of the cases. First, courts should, as common sense and good manners would seem to demand, pay careful attention to agencies’ explanations for their statutory constructions.²⁹ Second, some recurring circumstances justify a stronger form of deference that requires affirmance of an agency’s statutory construction so long as it is reasonable. One of the most frequently offered justifications for this strong form of deference was that an agency’s interpretation was “longstanding.”³⁰

A. *Skidmore’s Duty of Attention as “Deference” (or “Respect” or “Weight”)*

It should seem obvious that a court, when determining how to construe a statute that an agency administers, should pay careful attention to the agency’s explanation for its own construction. Indeed, this duty may seem so self-evident that it hardly requires a legal doctrine all its own to support it.³¹ Nonetheless, this requirement has

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁷ See *infra* note 49 and accompanying text.

²⁸ See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985) (providing a “partial list” of factors justifying deference, including, *inter alia*: whether the agency interpretation was long-standing; whether it was generated contemporaneously with the statute subject to interpretation; whether the agency’s interpretation was consistent over time; whether the interpretation had generated reliance interests; whether the interpretation implicated agency expertise, etc.); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972, 972–75 (1992) (describing the flexible, pragmatic approach to judicial review of the pre-*Chevron* era).

²⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

³⁰ See *infra* note 49 (collecting a sample of cases).

³¹ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) (“Justice Jackson’s eloquence notwithstanding, the rule of *Skidmore* deference is an empty

come to be called “*Skidmore* deference” after the case with which it is most closely associated, *Skidmore v. Swift & Co.*³² In essence, *Skidmore* tells courts to pay attention to agency statutory constructions but to follow them only to the degree they are persuasive.³³ As this approach instructs courts to adopt statutory constructions that the courts, rather than agencies, deem best, it is fair to argue that *Skidmore* does not really require “deference” as such at all.³⁴ Some therefore prefer the phrase “*Skidmore* respect” or “*Skidmore* weight.”³⁵

In *Skidmore*, employees of Swift & Co. claimed entitlement to overtime pay under the Fair Labor Standards Act (FLSA) for time they spent at the worksite on call to respond to fire alarms and the like.³⁶ They were largely free to spend their time as they wished, sleeping, eating, playing games, etc.³⁷ The Supreme Court explained that “no principle of law found either in the statute or in Court decisions preclude[d] waiting time from also being working time.”³⁸ Rather, whether wait time was work time in a given case depended on application of the statute to the particular facts.³⁹ In some statutory schemes, Congress commits adjudication of such “mixed questions of law and fact” to agencies, and courts are supposed to affirm the results so long as they are reasonable.⁴⁰ Congress had committed resolution of FLSA claims, however, to the district courts, so there was no agency finding regarding whether the *Skidmore* plaintiffs’ wait time was work time that a court might treat as “binding.”⁴¹

The FLSA had, however, created the Office of Administrator and given that official power to investigate work conditions and bring public actions seeking injunctive relief.⁴² In pursuance of these duties, the Administrator had issued an interpretive

truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.”).

³² *Skidmore*, 323 U.S. at 134.

³³ *Id.* at 140 (referring to factors that give an agency explanation the “power to persuade” if not “control”).

³⁴ *Id.*

³⁵ See, e.g., *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 832 (9th Cir. 2012) (en banc) (referring to “*Skidmore* respect”); see also Strauss, “*Deference*” Is Too Confusing, *supra* note 7, at 1145 (persuasively arguing that use of the slippery term “deference” in the context of judicial review doctrine does far more harm than good).

³⁶ *Skidmore*, 323 U.S. at 135–36.

³⁷ *Id.* at 136.

³⁸ *Id.*

³⁹ *Id.* at 136–37 (“We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”).

⁴⁰ The most famous example of this approach to mixed questions is *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 131 (1944) (stating that the National Labor Relations Board’s resolution of mixed question of whether “newsboys” were “employees” was to be upheld if it had “warrant in the record and a reasonable basis in law” (internal quotation marks omitted)).

⁴¹ *Skidmore*, 323 U.S. at 138–40.

⁴² *Id.* at 137.

bulletin and informal rulings explaining his views on how to determine when periods of inactivity should count as work time.⁴³ Although these views did not bind the courts, they were entitled to “respect” as the product of “specialized experience” gained in pursuit of official duties.⁴⁴ Justice Jackson explained:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁴⁵

Thus, a court must pay attention to an agency’s views regarding statutory construction and application, but the court should only follow these agency views to the extent they are persuasive.⁴⁶ Whether the agency’s views are persuasive, of course, depends on the good judgment of the court.⁴⁷

B. Circumstances Justifying Strong Deference (a.k.a. Rationality Review)

Skidmore expresses a baseline that courts, although they owe respect to agencies’ well-reasoned views, should ultimately choose statutory constructions that the courts, not agencies, deem best. Many judicial opinions issued over the last two centuries, however, have identified factors justifying stronger deference that checks not whether agency statutory constructions are correct, but whether they are reasonable.⁴⁸ Of particular note, many cases emphasize the importance of deferring to long-standing agency statutory constructions, especially if they have been consistent over time or were adopted near the time Congress enacted the statute at issue.⁴⁹

⁴³ *Id.* at 138.

⁴⁴ *Id.* at 139–40.

⁴⁵ *Id.* at 140.

⁴⁶ *Id.*

⁴⁷ For acid commentary by *Skidmore*’s mortal foe, see *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (characterizing *Skidmore* as an expression of “that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test”).

⁴⁸ See, e.g., Diver, *supra* note 28 (identifying pre-*Chevron* factors justifying rationality review).

⁴⁹ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974) (noting “a court may accord great weight to the longstanding [agency] interpretation”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969) (“[The] venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it

One of the earliest statements by a federal court of the idea that long-standing, consistent agency statutory constructions deserve strong deference came in 1810 in *United States v. Vowell*.⁵⁰ A ship carrying a cargo of salt arrived in the “district” of Alexandria on December 23, 1807.⁵¹ Taking its time, the ship did not sail the last few miles to the port of entry within the district until January 1, 1808.⁵² There was a good reason for this delay—a statutory duty on imported salt lapsed on December 31, 1807.⁵³ The government contended that Vowell had not avoided this tax because arrival in the district triggered the duty;⁵⁴ Vowell countered that arrival at the port of entry was the triggering event.⁵⁵

In a paragraph-long opinion, Chief Justice Marshall made short work of rejecting the government’s stance.⁵⁶ He added that “[i]f the question had been doubtful,” he would have followed the “uniform construction” of the Treasury Department on “similar questions.”⁵⁷ This agency had consistently taken the view that, to beat the effective date of a statutory *increase* in duties, ships had to arrive at a port of entry rather than the geographic district containing that port.⁵⁸ The Court admonished that this long-standing construction applicable to *increases* should also apply to *decreases*.⁵⁹

is wrong.”); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (ceding “peculiar weight” to “a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion”); *Louisville & Nashville R.R. Co. v. United States*, 282 U.S. 740, 757 (1931) (“[I]n the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons.”); *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 280 (1929) (“It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect”); *Nat’l Lead Co. v. United States*, 252 U.S. 140, 145–46 (1920) (“[G]reat weight will be given to the contemporaneous construction by department officials . . . especially where such construction has been long continued”); *United States v. Finnell*, 185 U.S. 236, 244 (1902) (Brown, J., dissenting) (stating that, in case of “doubt,” the long-standing interpretation of “the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons”); *Edwards’ Lessee v. Darby*, 12 U.S. (1 Wheat) 206, 210 (1827) (holding where construing an ambiguous law, “the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect”); see also Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1063–66 (2005) [hereinafter Murphy, *Judicial Deference*] (arguing for a “commitment” theory that justifies deference to long-standing agency statutory constructions).

⁵⁰ 9 U.S. (5 Cranch) 368 (1810).

⁵¹ *Id.* at 368.

⁵² *Id.*

⁵³ *Id.* at 369.

⁵⁴ *Id.*

⁵⁵ *Id.* at 370.

⁵⁶ *Id.* at 372.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Vowell is a tempting example because it is so old, Chief Justice Marshall wrote it, and the facts border on the colorful. Two factors weaken it as a precedent, however. First, Chief Justice Marshall made plain that he rejected on the merits the government's new position on decreases regardless of whether the government's old stance on increases warranted weight.⁶⁰ His observations on deference were dicta. Second, the government's inconsistent positions on statutory increases and decreases had a heads-the-government-wins-tails-the-importer-loses quality that the Court disliked.⁶¹

Let us therefore examine one more example from the many available. The 1914 case of *Logan v. Davis*⁶² turned on construction of an 1887 act that "adjusted" grants of lands to railroads—i.e., took back land that had been improperly granted.⁶³ These adjustments raised the problem of what to do about lands that the railroads were supposed to give back to the government but had already transferred to someone else.⁶⁴ To address this problem, Congress included a provision at section 4 of the 1887 act to protect good faith purchasers,⁶⁵ such as Logan claimed to be.⁶⁶ The dispositive issue was whether this protection extended to purchases made *after* the 1887 act was passed. On this point, the Court declared:

Whether § 4 was confined to purchases made prior to the date of the act, or equally included subsequent purchases, where made in good faith, is one of the controverted questions in the case. Both views have support in the terms of the act, and if the question were altogether new there would be room for a reasonable difference of opinion as to what was intended. Certainly, resort to interpretation would be necessary. But the question is not altogether new. It has often arisen in the administration of the act, and successive Secretaries of the Interior uniformly have held that the remedial sections embraced purchases after the date of the act, no less than prior purchases, if made in good faith. . . . Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² 233 U.S. 613 (1914).

⁶³ *Id.* at 614 (construing Adjustment Act of Mar. 3, 1887, ch. 376, 24 Stat. 556 (codified as amended at 43 U.S.C. §§ 894–899 (2006))).

⁶⁴ *See id.*

⁶⁵ Adjustment Act of 1887, ch. 376 § 4, 43 U.S.C. § 897 (2006) (providing for the adjustment of land grants made by Congress to aid in the construction of railroads).

⁶⁶ *Logan*, 233 U.S. at 619.

entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.⁶⁷

The Court thus declined to determine the best meaning of section 4. It did not need to do so—it was enough to determine that the Secretary’s construction was long-standing, uniform, and reasonable.⁶⁸ Abandoning this agency construction would disturb reliance interests and cause “serious and harmful results.”⁶⁹ It was therefore proper to apply the “settled rule” of following long-standing agency statutory constructions.⁷⁰

Courts offered a mix of epistemic and instrumental reasons for extending strong deference to consistent, long-standing agency statutory constructions. For instance, courts sometimes explained that agencies, thanks to their expertise or involvement in statutory drafting, had special insights into congressional purposes embedded in statutes.⁷¹ Instrumental justifications often implicated broad “good government” policies not tied to the specifics of any given statutory scheme. As *Logan* stressed, deferring to long-standing agency statutory constructions enhances legal stability, consistency, and reliance interests.⁷² Moreover, deference minimizes the possibility that a generalist court might impose a statutory construction that needlessly interferes with an agency’s ability to implement congressional policy effectively and efficiently. In sum, courts recognized that strong deference is sometimes proper because: (1) agencies sometimes know better than courts what Congress meant to achieve in a particular statute; and (2) respecting agency statutory constructions furthers values such as legal consistency, respect for reliance interests, and effective, efficient administration.

II. *CHEVRON* AND SOME AFTERMATH

The deference doctrines discussed above spelled at least a little trouble for the Environmental Protection Agency (EPA) in *Chevron*, which turned on a challenge to the agency’s third construction in four years of the phrase “stationary source” in the Clean Air Act Amendments of 1977.⁷³ This inconsistency obviously meant that the

⁶⁷ *Id.* at 626–27 (citing *Kindred v. Union Pac. R.R. Co.*, 225 U.S. 582, 596 (1912); *United States v. Ala. Great S. R.R. Co.*, 142 U.S. 615, 621 (1892); *Hastings & Dakota R.R. Co. v. Whitney*, 132 U.S. 357, 366 (1889); *United States v. Moore*, 95 U.S. 760, 763 (1877)) (providing support for deference to long-standing agency constructions).

⁶⁸ *Id.*

⁶⁹ *Id.* at 627.

⁷⁰ *Id.*

⁷¹ *See, e.g., Moore*, 95 U.S. at 763 (observing that agency officials charged with implementing a new statute were likely to be “able men” and “not unfrequently . . . draftsmen of the laws they are afterwards called upon to interpret”).

⁷² *See Logan*, 233 U.S. at 626–27.

⁷³ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 853–59 (1984) (detailing the EPA’s efforts between 1977 and 1981 to construe “stationary source”).

challenged statutory construction was ineligible for deference as a long-standing interpretation. Moreover, in *Skidmore*, Justice Jackson had mentioned agency consistency as a factor indicating that a statutory construction was persuasive.⁷⁴ Inconsistency, in law as in life, would seem to suggest the contrary.

The EPA's flip-flopping did not, however, alter the basic fact that the agency had far more expertise than the courts on how to clean up the air. *Chevron's* core insight is that this statute-specific policy expertise, when deployed in a demonstrably reasonable way, justifies strong judicial deference to an agency's statutory construction—even if the agency's challenged construction is new or inconsistent with the agency's earlier views.⁷⁵ The *Chevron* doctrine's flowering into a complex, confusing body of law is due in no small part to its failure to focus tightly on this simple, compelling insight.

A. A Quick *Chevron* Stop

Time for the inevitable *Chevron* discussion: The Clean Air Act Amendments of 1977 required “nonattainment” states to impose a burdensome permitting process on “new or modified major stationary sources of air pollution.”⁷⁶ This obligation concentrated attention on the meaning of “stationary source.” More particularly, it raised the question of how to apply this statutory phrase to plants containing more than one pollution-emitting device.⁷⁷ One might take the view that each device was its own “stationary source.”⁷⁸ Alternatively, one might treat the entire plant as one “stationary source,” encasing all of its devices in one regulatory “bubble.”⁷⁹

The EPA's views on this point varied over time and changing administrations. In 1979, the agency declared that a plant-wide definition could be applied pursuant to revised state implementation plans (SIPs) that satisfied various requirements, including making “reasonable further progress” on satisfying limits on air pollution.⁸⁰ In 1980, the agency changed course, adopting a “dual definition” under which both a plant and its components counted as “stationary sources.”⁸¹ In this approach, a change in a component that generated a significant increase in emissions would be subject to permitting even if other changes in the plant (under the “bubble”) would create offsetting reductions.⁸² The agency based this new stance in large part on two decisions by the D.C.

⁷⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁷⁵ *Cf. Chevron*, 467 U.S. at 863–64 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

⁷⁶ *Id.* at 839–40 (citing Clean Air Act Amendments of 1977, § 172(b)(6), 42 U.S.C. § 7502(b)(6) (2006)).

⁷⁷ *Id.* at 840.

⁷⁸ *Id.* at 859.

⁷⁹ *Id.*

⁸⁰ *Id.* at 854–55.

⁸¹ *Id.* at 857.

⁸² *Id.*

Circuit Court of Appeals holding that the bubble concept should not apply to programs designed to reduce air pollution.⁸³

In 1981, after the Reagan administration swept into office on a deregulatory agenda, the EPA changed course again and adopted a rule that allowed SIPs to apply the “bubble concept” and treat entire plants, rather than individual components, as “stationary sources.”⁸⁴ This approach would allow a firm to avoid permitting for modifications that increased emissions from one component in a plant so long as the firm found offsetting decreases from other components under the bubble. The EPA explained that this change was justified because it would encourage modernization of plant components with newer, cleaner processes.⁸⁵ Also, the change helped simplify administration and eliminate confusion by ensuring that the agency applied just one definition of “source” across various programs designed to prevent or reduce air pollution.⁸⁶ The EPA added that the change would not interfere with efforts to achieve compliance with air pollution limits set by national ambient air quality standards.⁸⁷

Environmentalists successfully challenged the new rule before the D.C. Circuit.⁸⁸ The court conceded that Congress had not offered an explicit definition of “stationary source” and that the legislative history was scant and “contradictory.”⁸⁹ Nonetheless, application of the bubble concept in nonattainment areas was illegal because it violated the Clean Air Act’s policy of improving air quality as determined by two earlier D.C. Circuit opinions.⁹⁰

One might be forgiven for thinking that the D.C. Circuit had merely carried out its *Marbury* job to “say what the law is.”⁹¹ The Supreme Court nonetheless reversed, declaring that the D.C. Circuit had made a “basic legal error” by “adopt[ing] a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.”⁹² When Congress delegates to an agency the task of implementing a statute, it also implicitly delegates to the agency the task of resolving ambiguities in that statute.⁹³ Thus, it was up to the EPA, not the D.C. Circuit, to choose among reasonable constructions of “stationary source.”

⁸³ *Id.* at 857 n.29 (citing *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979); *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978)).

⁸⁴ *Id.* at 857–58.

⁸⁵ *Id.* at 858 (citing Requirements for Preparation, Adoption, and Submittal of Information Plans; Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 16,280–01 (proposed Mar. 12, 1981)).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982), *rev’d sub nom.* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁸⁹ *Id.* at 723, 726 n.39.

⁹⁰ *Id.* at 720, 726–27 (relying on the *Alabama Power–ASARCO* test the court pulled from *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), and *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978)).

⁹¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁹² *Chevron*, 467 U.S. at 842.

⁹³ *Id.* at 844.

To give effect to this allocation of power, the Court instructed lower courts reviewing an agency's construction of a statute it administers to follow what has come to be called the "*Chevron* two-step":

First [step one], always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather [step two], if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁹⁴

Applying this framework, the Court determined at step one that neither the Clean Air Act Amendments of 1977 nor related statutes indicated that Congress had formed any intent regarding the legality of the bubble concept.⁹⁵ Legislative history was likewise unhelpful.⁹⁶

Although it did not expressly say so, the Court treated step two's inquiry into permissibility as a standard (if rather cursory) exercise in policy review.⁹⁷ Review of a discretionary policy decision for "reasoned decisionmaking" requires a court to check whether an agency gave due consideration to the "relevant factors" that Congress expected the agency to assess; it also checks whether the agency avoided any "clear error of judgment."⁹⁸ The Court observed that congressional policy concerns included both promoting "reasonable economic growth" and environmental protection.⁹⁹ The EPA had considered both of these "relevant factors" in the course of adopting its "bubble concept" approach to "stationary source."¹⁰⁰ Far from amounting to a clear error, this decision represented a "reasonable accommodation of manifestly conflicting interests" with support in the rulemaking record.¹⁰¹ Given the EPA's careful, expert consideration of a highly technical problem, the Court refused to second-guess the agency's policy judgment.¹⁰²

⁹⁴ *Id.* at 842–43 (citations omitted).

⁹⁵ *Id.* at 861.

⁹⁶ *See id.* at 862–64.

⁹⁷ *Id.* at 864–66.

⁹⁸ *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the canonical statement on review of agency policy judgments for reasoned decisionmaking).

⁹⁹ *Chevron*, 467 U.S. at 863.

¹⁰⁰ *Id.* at 863, 866.

¹⁰¹ *Id.* at 863–65.

¹⁰² *Id.* at 865.

Stepping back, the Court's analysis all flowed smoothly from its initial move declaring that agencies, not courts, should control resolution of ambiguities in agency enabling acts. The Court offered, depending on how one counts, two or three justifications for this move. First, it stated that Congress had "implicitly delegated" authority to agencies to resolve such ambiguities.¹⁰³ Calling a delegation "implicit," however, is another way of saying that Congress itself said nothing about the matter.¹⁰⁴ The "implicit delegation" rationale is not really a statement about congressional intent. Rather, it represents the Court's conclusion about what a reasonable legislature *should* want. And it turns out that reasonable legislatures want what reasonable courts, such as the Supreme Court, want reasonable legislatures to want.

It is not difficult to fashion counter-arguments that a reasonable legislature should, contra *Chevron*, want courts, rather than agencies, to resolve ambiguities in agency enabling acts. For instance, à la *Marbury*, tradition and history establish that determining statutory meaning is a classic judicial function.¹⁰⁵ This expectation is consistent with the Administrative Procedure Act's command to courts reviewing agency action to "decide all relevant questions of law" and "interpret constitutional and statutory provisions of law."¹⁰⁶ Therefore, Congress, absent express instructions to the contrary, would expect courts to continue to carry out this task. Sounding a separation-of-powers theme, entrusting statutory construction to the courts minimizes the risk of agency overreaching. Turning to rule-of-law values, judicial control enhances legal certainty and consistency thanks to judicial adherence to *stare decisis*. The Supreme Court did not discuss such possibilities in *Chevron*.

It did, however, buttress its case for deference to agencies with two more justifications—political accountability and agency expertise.¹⁰⁷ The Court observed that agencies are answerable to the political branches and that their policy choices therefore have a greater claim to legitimacy than judicial ones.¹⁰⁸ This justification arguably had special salience at the time that *Chevron* was decided because President Reagan had explicitly run on a deregulatory platform.¹⁰⁹ It also may have particular bite as applied to "big

¹⁰³ *Id.* at 844.

¹⁰⁴ For a recent and thorough take-down of the implicit-congressional-intent justification for *Chevron*, see especially Seidenfeld, *Chevron's Foundations*, *supra* note 7, at 276–88.

¹⁰⁵ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

¹⁰⁶ Administrative Procedure Act § 706, 5 U.S.C. § 706 (2006).

¹⁰⁷ *Chevron*, 467 U.S. at 865.

¹⁰⁸ *Id.* at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

¹⁰⁹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

deal” rules sufficiently important and controversial to generate significant public attention. For most operations of the vast administrative state, however, this justification might seem a makeweight. Very few people thumb through the *Federal Register* to determine how to vote for President. Furthermore, political control of independent agencies is, by design, attenuated. Still, agencies can lay a stronger claim for the electoral legitimacy of the value choices that motivate their policies than life-tenured, unelected judges.

At the risk of indulging an editorial judgment, the best, most compelling rationale for *Chevron* deference is agency expertise.¹¹⁰ Generally speaking, agencies, not courts, are in a better position to understand the real-world implications of alternative constructions of agency enabling acts. This point holds particular force for agencies acting in highly specialized, technical fields, such as the EPA, the Federal Energy Regulatory Commission (FERC), and the Department of Energy (DOE).¹¹¹ A sensible court reviewing an agency’s construction of a statute it administers will therefore give substantial weight to the agency’s policy choices and justifications. Moreover, a sensible court might expect a sensible legislature to expect this judicial deference. As such, that sensible court might say that the sensible legislature “implicitly delegated” authority to the agency to construe statutory ambiguities.

B. Some Post-Chevron Complexities

The *Chevron* doctrine has generated a baroque body of law—good business for administrative law professors, as Justice Scalia has noted¹¹²—but maybe not for anyone else. Two aspects of *Chevron* exacerbate the problem. First, the implicit delegation

¹¹⁰ *Chevron*, 467 U.S. at 865 (noting that “[j]udges are not experts in the field”); see, e.g., Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 754 (2002) (concluding that agency expertise provides the best rationale for judicial deference to agency statutory constructions). *But see* Criddle, *supra* note 7, at 1275 (arguing that *Chevron* rests on multiple foundations rather than a single correct one and observing that the Court applies *Chevron* deference only “where agency decision-making processes satisfy five core factors: (1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity”).

¹¹¹ For evidence that the Supreme Court is, in fact, more likely to affirm agency statutory constructions that implicate significant technical expertise, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1147 (2008) (“[C]omparative institutional competence and intensity of the Court’s opinions are at least somewhat predictive of agency win rates.”); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1783 (2010) (“Justices were less apt to overturn policies issued by agencies in highly and modestly technical areas.”).

¹¹² *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

justification invited focus on the specific contours of a non-existent congressional intent, which is a little like arguing over the real color of unicorns. Second, although the best justification for *Chevron* is respect for agency policymaking expertise, the *Chevron* two-step reserves analysis of agency policymaking for step two.

1. The Problem of Step Zero

One of the drivers of the delegation problem is the sense, likely mistaken in part, that *Chevron* deference is strong medicine.¹¹³ On this view, requiring courts to defer to any reasonable agency statutory construction, à la *Chevron*, as opposed to leaving courts in charge, à la *Skidmore* or maybe even *Marbury*, is a big deal. It might follow that a sensible Congress would not want the courts to apply this strong medicine to any old agency construction of a statute that the agency administers. Only worthy agency statutory constructions need apply. This problem of determining the applicability of *Chevron* deference is often called “step zero.”¹¹⁴

Over the last decade or so, the Supreme Court has issued a series of step-zero cases, not all of which seem to agree with each other. Two especially notable members of this group are *United States v. Mead Corp.*¹¹⁵ and *Barnhart v. Walton*.¹¹⁶ If these two cases do not actually contradict each other, they certainly adopt very different approaches to the problem.

Chevron addressed a very important social issue—the scope of permitting requirements under the Clean Air Act Amendments of 1977.¹¹⁷ *Mead*, by contrast, addressed whether three-ring day planners imported by Mead were “bound” “diaries” within the meaning of the Harmonized Tariff Schedule of the United States and thus subject to a four-percent tax.¹¹⁸ For some years, Customs took the view that the binders were not “bound” “diaries” and thus not subject to the duty—a state of affairs that Mead rather liked.¹¹⁹ In 1993, Customs realized that the day planners were “bound” “diaries” after all and issued a Headquarters ruling letter to this effect.¹²⁰ Mead sought review within Customs, from the Court of International Trade, and before the Federal Circuit.¹²¹ The Federal Circuit agreed with Mead, concluding that the day planners were not “diaries” because they did not have enough writing space and were not “bound” because, if they

¹¹³ For evidence that *Chevron* is not so strong medicine, see *supra* note 5 and accompanying text, citing to studies demonstrating that judicial affirmance rates do not vary much by deference doctrine.

¹¹⁴ Criddle, *supra* note 7, at 1299 (citing Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 224–26 (2006)).

¹¹⁵ 533 U.S. 218 (2001).

¹¹⁶ 535 U.S. 212 (2002).

¹¹⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839–40 (1984).

¹¹⁸ *Mead*, 533 U.S. at 224.

¹¹⁹ *Id.* at 225.

¹²⁰ *Id.*

¹²¹ *Id.* at 225–26.

were, the category of “unbound” diaries would be empty.¹²² More to the present point, the Federal Circuit also categorically held that the Customs ruling letters were not eligible for *Chevron* deference because they were adopted without public procedures, determined outcomes solely in individual cases, and lacked the “force of law.”¹²³

The Supreme Court agreed with the Federal Circuit that *Chevron* deference was inapplicable.¹²⁴ The Court advised that *Chevron* applies only where “it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹²⁵ This formulation of step zero was unfortunate in part because the phrase “force of law” is one of the more confusing and pernicious terms in the administrative law vocabulary.¹²⁶ It also has two steps of its own,¹²⁷ which leaves *Chevron* with three or four steps, depending on how one counts.

Elaborating on step one of *Mead*, the Court declared that Congress can demonstrate its intent to grant *Chevron* authority by expressly delegating power to an agency to engage in “rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”¹²⁸ An idea underlying this assertion is that Congress would expect that agency actions subject to extensive and relatively transparent procedures, such as notice-and-comment rulemaking or formal adjudication, should merit the force of law.¹²⁹ The Court added, however, that Congress might demonstrate its intent to grant force-of-law power to an agency via “some other indication[s]” that the Court left unspecified.¹³⁰

Mead’s step two checks whether an agency actually invoked its force-of-law power to imbue a statutory construction with *Chevron*’s protective deference.¹³¹ In many cases, this will not be problematic—e.g., where an agency uses notice-and-comment rulemaking to adopt a statutory construction. In *Mead*, however, Customs’ ruling letter failed this invocation prong because, inter alia: (1) Customs expressly advises third parties not to rely on ruling letters received by others; and (2) several dozen Customs offices issue thousands of ruling letters per year with little or no procedure.¹³² As such,

¹²² *Id.* at 226.

¹²³ *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999), *overruled by* 533 U.S. 218 (2001).

¹²⁴ *Mead*, 533 U.S. at 227.

¹²⁵ *Id.* at 226–27.

¹²⁶ For discussion of the incoherence of “force of law” as deployed by *Mead*, see Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1038–44 (2005).

¹²⁷ *Mead*, 533 U.S. at 226–27.

¹²⁸ *Id.* at 229.

¹²⁹ *Id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

¹³⁰ *Id.* at 227.

¹³¹ *Id.* at 226–27.

¹³² *Id.* at 218–19, 233.

Customs' ruling letters did not amount to a "legislative-type" activity that one would expect to "bind more than the parties to the ruling."¹³³

Mead is a complex opinion that has generated substantial commentary and controversy, and the preceding summary is incomplete. Still, it suggests a straightforward safe harbor at step zero: *Chevron* deference should apply to agency statutory constructions developed via notice-and-comment rulemaking or formal adjudication. Outside the safe harbor, things can get tricky.

Barnhart v. Walton took a very different approach.¹³⁴ In 1957, the Social Security Administration adopted a definition of the statutory term "disability" in an opinion letter issued without formal process.¹³⁵ By the time of the *Walton* case, this opinion letter was nearing fifty years of age, which would have entitled it to deference under plenty of pre-*Chevron* precedent.¹³⁶ The opinion letter did not, however, fall into a *Mead* safe harbor. Perhaps to correct this defect, the agency embedded its construction of "disability" into a rule adopted via notice-and-comment.¹³⁷ A unanimous Court subsequently agreed that *Chevron* deference applied.¹³⁸

Writing for eight Justices, Justice Breyer seized an opportunity to move *Chevron*'s step zero in the more nuanced direction he prefers.¹³⁹ He explained that even without the benefit of notice-and-comment, the agency's statutory construction would still merit *Chevron* deference:

[T]he Agency's interpretation is one of long standing And the fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due. . . .

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the

¹³³ *Id.* at 232.

¹³⁴ 535 U.S. 212 (2002).

¹³⁵ *Id.* at 212, 219–20.

¹³⁶ *See id.* at 220 ("And this Court will normally accord particular deference to an agency interpretation of 'longstanding' duration."). *But see id.* at 226 (Scalia, J., concurring in part and concurring in the judgment) (condemning the notion that long-standing agency interpretations warrant deference as an anachronistic "relic of the pre-*Chevron* days").

¹³⁷ *Id.* at 217, 221 (noting the possibility that the agency initiated rulemaking in response to the litigation).

¹³⁸ *Id.* at 212, 214, 217; *id.* at 227 (Scalia, J., concurring in part and concurring in the judgment).

¹³⁹ *See, e.g.,* Murphy, *Judicial Deference*, *supra* note 49, at 1037 (discussing Justice Breyer's more nuanced dissent in *Christensen v. Harris County*, 529 U.S. 576 (2000)).

appropriate legal lens through which to view the legality of the Agency interpretation here at issue.¹⁴⁰

Put another way: Courts should approve of reasonable agency constructions that have lasted a long time that address difficult, important questions with careful analysis.¹⁴¹ This stance is consistent with both *Chevron* itself and with pre-*Chevron* case law. Conceptually, however, it does not square very easily with *Mead*'s hunt for proof that an agency has been delegated and has invoked authority to imbue an interpretation with the "force of law."¹⁴²

The Court's most recent foray into the problem of *Chevron*'s domain came in *City of Arlington v. FCC*.¹⁴³ Justice Scalia opened the majority opinion by characterizing the issue as "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to [*Chevron*] deference."¹⁴⁴ This abstract issue was rooted in a tussle over FCC control over state and local siting decisions for cell phone towers.¹⁴⁵ The Telecommunications Act of 1996 incorporated limits on state and local control over such siting decisions into the Communications Act.¹⁴⁶ These are codified at 47 U.S.C. § 332(c)(7)(B). The Act expressly states that it imposes no other limits on state and local control.¹⁴⁷ It also provides a judicial cause of action to contest claims that a state or locality has violated these limits.¹⁴⁸

One of these limits, codified at 42 U.S.C. § 332(c)(7)(B)(ii), is that state and local governments must act on siting applications "within a reasonable period of time after the request is duly filed."¹⁴⁹ This vague language naturally raises the question: What is a "reasonable period of time"? The FCC has statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications Act]."¹⁵⁰ Responding to complaints of delay by wireless service providers, the FCC invoked this authority to issue a declaratory ruling setting presumptive time limits on siting applications.¹⁵¹ To justify this decision, the FCC observed that "unreasonable delays . . . have obstructed the provision of wireless services" and

¹⁴⁰ *Barnhart*, 535 U.S. at 221–22 (citations omitted).

¹⁴¹ *See id.*

¹⁴² *See* Murphy, *Judicial Deference*, *supra* note 49, at 1015, 1039 (discussing the role of the question of whether Congress has given the agency the authority "to make rules carrying the force of law").

¹⁴³ 133 S. Ct. 1863 (2013).

¹⁴⁴ *Id.* at 1866.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (citing *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)).

¹⁴⁷ *Id.* at 1866.

¹⁴⁸ *Id.* at 1867.

¹⁴⁹ 42 U.S.C. § 332(c)(7)(B)(ii) (2006).

¹⁵⁰ 47 U.S.C. § 201(b) (2006).

¹⁵¹ *In re* Petition for Declaratory Ruling, 24 FCC Rcd. 13,994 (2009).

“impede[d] the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996.”¹⁵²

The cities of Arlington and San Antonio challenged the declaratory ruling on a variety of grounds, all rejected by the Fifth Circuit.¹⁵³ The Supreme Court granted a writ of certiorari solely on the recurring question of whether *Chevron* deference applies to agency assertions of “jurisdiction.”¹⁵⁴ Much of the oral argument was spent trying to figure out just what “jurisdiction” might mean in this context.¹⁵⁵

Justice Scalia, ever the *Chevron* maximalist and author of the six to three majority opinion, explained that this confusion was understandable because the distinction between jurisdictional and nonjurisdictional decisions at the agency level is a “mirage.”¹⁵⁶ Any claim that an agency has exceeded its statutory authority can be characterized as a “jurisdictional” question—or not.¹⁵⁷ As the jurisdictional inquiry can add nothing but confusion to review of agency action, federal judges should avoid it.¹⁵⁸

The three-Justice dissent, led by Chief Justice Roberts, demonstrates the hold that the “implicit delegation” theory of *Chevron* continues to have on judicial minds.¹⁵⁹ According to the Chief Justice, the question of “jurisdiction” in this context boils down to whether Congress wished an agency to enjoy *Chevron* authority to imbue its construction of a particular statutory provision with the force of law.¹⁶⁰ Courts should not defer to an agency on this threshold question of whether Congress wanted courts to defer to the agency.¹⁶¹ Understood in this sense, *Chevron* should not apply to “jurisdictional” questions.

¹⁵² *Id.* at 14,006, 14,008.

¹⁵³ *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

¹⁵⁴ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867–68 (2013); *cf.* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (arguing that agencies should not, in general, receive *Chevron* deference when interpreting their own jurisdiction).

¹⁵⁵ *See* Transcript of Oral Argument at 4, 8–10, 29–32, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545) (showing the parties argued this issue for over six pages); *see also City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting) (“The source of the confusion is a familiar culprit: the concept of ‘jurisdiction,’ which we have repeatedly described as a word with many, too many, meanings.” (citation omitted) (internal quotation marks omitted)).

¹⁵⁶ *See City of Arlington*, 133 S. Ct. at 1868 (alluding to the confusing nature of the terms “jurisdictional” and “non-jurisdictional”).

¹⁵⁷ *Id.* at 1869–70.

¹⁵⁸ *See id.* at 1871 (“The federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as ‘jurisdictional,’ is not engaged in reasoned decisionmaking.”).

¹⁵⁹ *Id.* at 1880 (Roberts, C.J., dissenting) (“We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities ‘with the force of law.’”).

¹⁶⁰ *Id.* at 1879–80.

¹⁶¹ *Id.* at 1880 (“But before a court may grant such [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”).

The majority's refusal in *City of Arlington* to add further complications to step zero by requiring a more fine-grained search for a fictional congressional intent was certainly a positive development for judicial-deference doctrine. It did not, however, undo the needless complexities generated by earlier cases, most notably *Mead*. As discussed below, one way to eliminate these complexities is to dump the implicit delegation fiction. *Chevron* deference is best justified by policy expertise; courts should check whether an agency's statutory construction deserves this type of deference by determining whether the agency has offered a reasonable, policy-based explanation for it.

2. Putting the Judicial Cart Before the Agency Horse at Step One

A moment's reflection on the *Chevron* two-step might raise the question: Just what is the point of step two? Step one determines if Congress has clearly precluded an agency statutory construction. If the construction survives step one, it must fall within the space in which reasonable minds might disagree. If step two merely checks whether an agency statutory construction represents a reasonable outcome, then it has no work to do after step one is done. One way around this conundrum is to think of step two as checking whether the agency supported its statutory construction with reasoned decisionmaking—i.e., in the course of making its policy commitments, has the agency considered the “relevant factors” and avoided any clear error of judgment.¹⁶² This view of step two, in addition to giving it a reason for existing, has the virtue of tracking the Supreme Court's analysis in *Chevron* itself.¹⁶³

It also, however, raises questions about the effects of step one, which advises courts to deploy independently all “traditional tools of statutory construction.”¹⁶⁴ These tools include the statutory language directly at issue, related statutory language and context, statutory purpose, policy analysis, canons of construction, etc.¹⁶⁵ How a judge assesses these materials depends both on the judge and the particulars of the case. Sometimes, a quick read of the statute might be dispositive. This is another way of saying that some cases are resolved by “plain meaning.” In less obvious cases, far more extensive review of more varied materials may prove necessary. At some point in this process, the judge will leap from consideration of the materials to a conclusion—e.g., that Congress clearly precluded the agency's statutory construction (or not). Put another way, in tough, interesting cases, how a court assesses an agency's statutory construction will depend on the totality of the circumstances as filtered through the judge's experiences, training, and inclinations.

¹⁶² See Levin, *supra* note 18, at 1253–56 (analyzing the role of the second step of *Chevron*); Seidenfeld, *A Syncopated Chevron*, *supra* note 18, at 83–84, 86–87 (asserting that agencies should be required to explain why their interpretations are good policy).

¹⁶³ See *supra* notes 76–79 and accompanying text (discussing *Chevron*'s review of the EPA's application of the bubble concept to “stationary source”).

¹⁶⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

¹⁶⁵ See *id.* at 862–66 (employing a number of these tools explicitly in its analysis).

As the *Chevron* doctrine is currently framed, step one invites courts to leap to these initial conclusions *before* fully focusing on the agency's policy explanation. It is strange that a doctrine rooted in deference to agency policy expertise encourages judges to focus on agency explanations at the end, rather than the start, of their assessments. One might think that, to the contrary, an expert agency's policy analysis should inform the court's understanding and application of the other "traditional tools."¹⁶⁶ The notorious stickiness of human judgments strengthens this point. People tend to discount new evidence that runs counter to their previously held views.¹⁶⁷ As such, if judges really do conduct step one independently and without regard for agency policy explanations, it is plausible that courts' step-one judgments might taint their assessment of agency explanations at step two.

III. REVERSE THE STEPS

There is a straightforward way to get rid of the *Chevron* maladies just discussed: Reverse the order of the *Chevron* two-step. Asking the (current) step-two question of whether the agency has a reasoned policy justification to support its preferred statutory construction would eliminate the need for a *Mead*-style step zero. Doing so would also allow agency policy concerns to appropriately inform courts' assessment of all the other "traditional tools of statutory construction" at (current) step one. An added bonus of switching the order of the steps is that it would highlight the simple overall structure of judicial deference to agency statutory constructions. Contrary to some appearances, this doctrine is easy—or at least it should be easier.

A. *Getting Rid of Step Zero*

The key drivers of the judicial-deference doctrine should be institutional competence and authority. Regarding competence, courts are at least as capable as agencies at the tasks of reading complex statutes, looking up words in dictionaries, applying canons of construction, etc. Moreover, the courts' role as neutral arbiters makes them more trustworthy interpreters in some respects than agencies caught up in rulemaking and enforcement. By contrast, agencies are generally supposed to be better than courts at analyzing legislative facts and assessing the real-world consequences of alternative

¹⁶⁶ Cf. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–100 (2007) (Breyer, J., plurality) (flipping the order of the *Chevron* two-step so that agency policy views could inform judicial determination of the range of permissible meanings technical statutory language could bear). For further discussion of the Justices' opinions in *Zuni*, see *infra* notes 195–218 and accompanying text. See also Strauss, "Deference" Is Too Confusing, *supra* note 7, at 1165 (explaining that courts should apply *Skidmore* "weight," which is itself a traditional tool of statutory construction, at *Chevron* step one).

¹⁶⁷ See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 80–81 (2011) (discussing "confirmation bias").

agency actions. Agencies, in short, should be better at making policy choices within their jurisdictions than courts. A deference doctrine based on these comparative advantages might be very simple: Courts control the task of interpreting statutes to determine *congressional* policy choices; agencies control the task of making *their own* subsidiary policy choices as needed to implement congressional policy choices.¹⁶⁸

In many situations, it is clear where institutional authority lies as between courts and agencies. For instance, Congress often expressly delegates to an agency authority to make legislative rules as reasonably necessary to implement its enabling act. Where an agency invokes this delegated authority to create a new legislative obligation, it is by hypothesis engaged in raw policymaking. Courts have neither the authority nor the competence to second-guess the agency's policy choice. This idea finds expression in judicial-review doctrine in the arbitrariness standard, which is supposed to be highly deferential.¹⁶⁹

The *Chevron* doctrine is befuddling in part because it deals with situations in which authority and competency potentially pull in competing directions, and Congress has not offered clear guidance. The background presumption that courts "say what the law is," embodied in *Marbury* and *Skidmore*, indicates that courts should construe agency-enabling acts in the manner courts deem most persuasive.¹⁷⁰ Agency expertise provides a pragmatic reason for courts to weaken this presumption insofar as a statutory construction depends on an agency's subsidiary policy choices. Congress usually does not resolve the tension between these impulses by expressly granting *Chevron*-style power over statutory construction to agencies.¹⁷¹ It did not, for instance, declare in the Clean Air Act Amendments of 1977 that courts should defer to any reasonable construction of "stationary source" that the EPA might devise.¹⁷²

Given this silence, the real ground for the *Chevron* doctrine is plainly not congressional intent but rather the Supreme Court's conclusion that the doctrine makes good sense.¹⁷³ The "implicit delegation" story is, in other words, just a characterization game.

¹⁶⁸ Cf. Koch, *supra* note 1, at 983–84 (explaining that courts should control issues of law but have neither the competence nor the authority to control policy).

¹⁶⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (discussing the "arbitrary and capricious" standard of review).

¹⁷⁰ See *supra* Part I.A (discussing *Skidmore* "deference").

¹⁷¹ Sometimes, however, Congress does expressly grant such power. See, e.g., 29 U.S.C. § 213(a)(15) (2006) (exempting "babysitting" and certain "companionship services" from Fair Labor Standards Act coverage, "as such terms are defined and delimited by regulations of the Secretary"); cf. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (applying *Chevron* deference to uphold a Department of Labor regulation construing this statutory provision). One might, of course, think that the fact that Congress sometimes expressly delegates the equivalent of *Chevron* authority undermines the argument for implicit delegations.

¹⁷² See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 851, 866 (1984) (upholding the EPA's definition of "stationary source" although Congress was silent on the issue).

¹⁷³ Cf. Seidenfeld, *Chevron's Foundation*, *supra* note 7, at 275 (rejecting the "implicit congressional intent" justification for *Chevron* and describing it as a "self-imposed constraint" meant

Such legal fictions are common and often harmless. This one, however, has transmuted into step zero's hunt for the precise contours of Congress's implicit (i.e., fake) intent regarding the scope of agencies' *Chevron*-style power.¹⁷⁴

The confusion that this hunt has caused serves no worthwhile purpose. If the core rationale for the *Chevron* doctrine is agency policy competence, then it should follow that the test for determining its applicability should be, quite simply: Has the agency offered a reasonable policy basis for its preferred construction, thus demonstrating that it deployed its policymaking competence?¹⁷⁵ Courts have a well-established and differential model for review of agency policy choices—review for reasoned decision-making.¹⁷⁶ This model also happens to be the same type of inquiry required by the current *Chevron* step two, best understood.¹⁷⁷

It follows that a court conducting a *Chevron* analysis should not start with a *Mead*-style hunt for a fictional congressional intent but should instead start with (current) *Chevron* step two, inquiring whether the agency supported its statutory construction with a reasoned policy choice. If not, then *Chevron* deference, as such, is inapplicable. If the agency's policy rationale passes muster, then the reviewing court should ask the (current) step-one question of whether Congress clearly precluded the agency's statutory construction. For ease of reference, let us call the reversed steps “step one*” and “step two*.”

This reordered *Chevron* would fit neatly and simply into the structure of pre-*Chevron* case law. The default *Skidmore* approach under the pre-*Chevron* regime is that courts choose the statutory constructions they deem most persuasive.¹⁷⁸ Special considerations, most notably the long-standing status of a statutory construction, may justify the strong deference of rationality review.¹⁷⁹ Sensibly combining these points leads to a system in which a court reviewing an agency statutory construction: (1) checks whether special grounds, such as long-standing status, justify strong deference; and then (2) applies the appropriate standard of review. A reordered *Chevron* fits this two-step exactly, recognizing that a reasoned agency policy justification, like long-standing status, is a justification for strong deference.

to block courts from reading their own policy preferences into statutes where “an appropriate alternative institution also bears responsibility for interpreting the statute”).

¹⁷⁴ See generally *infra* Part II.B (discussing several notable step-zero cases).

¹⁷⁵ Cf. Jordan, *supra* note 19, at 727–30 (arguing that a meaningful step two based on hard-look review eliminates many of the concerns addressed by *Mead*-style step-zero inquiries); Krotoszynski, *supra* note 110, at 737 (“Whether *Chevron* deference applies in a given case should not turn on the legal fiction of an implied delegation of lawmaking power, but rather on whether the materials at issue reflect and incorporate agency expertise.”).

¹⁷⁶ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the canonical statement on review of agency policy judgments for reasoned decisionmaking).

¹⁷⁷ See *supra* note 18 (citing authorities for the equivalence of *Chevron* step two and arbitrariness review).

¹⁷⁸ See *supra* Part I.A (discussing *Skidmore*).

¹⁷⁹ See *supra* Part I.B.

Consider how application of a reordered two-step might apply to *Chevron* itself. No step-zero inquiry into fictional congressional intent would be required. The Court would instead start its analysis by examining the EPA's policy explanation for preferring its "bubble concept" approach to "stationary source."¹⁸⁰ The EPA explained that this approach would foster economically efficient changes without impeding timely attainment of pollution goals and would simplify administration.¹⁸¹ In the real case, the Court concluded (in so many words) that this policy justification survived review for reasoned decisionmaking.¹⁸² It should therefore survive step one* of the reordered *Chevron*.

At step two*, the Court would, given the outcome of step one*, need to accept that the EPA's statutory construction would generate beneficial policy effects—i.e., the "traditional tool" of interstitial policy analysis favors the EPA. Given this much, the Court would assess whether any other pertinent "traditional tools" nonetheless indicated that Congress clearly wished to preclude the agency's choice. Nothing in the Clean Air Act Amendments of 1977, related statutes, or legislative history is plainly inconsistent with the EPA's "bubble concept" approach to "stationary source."¹⁸³ Therefore, it should survive step two*.

The 2006 case of *Gonzales v. Oregon*,¹⁸⁴ by contrast, provides a nice example of how an agency might fail to obtain deference from a reordered *Chevron*. In this case, the state of Oregon challenged an interpretive rule issued by Attorney General Ashcroft that determined that "[a]ssisting suicide is not a 'legitimate medical purpose' within the meaning of [the Controlled Substances Act (CSA).]"¹⁸⁵ This conclusion had the effect of criminalizing physician efforts to assist suicide in compliance with the Oregon Death with Dignity Act (ODWDA).¹⁸⁶ The majority avoided applying *Chevron* deference by narrowly construing the Attorney General's rulemaking authority to exclude efforts to define the scope of medical practice—a move in tension with the tendency in other contexts to define grants of rulemaking power broadly.¹⁸⁷

A reordered two-step would likewise deny *Chevron* deference, but for the more direct reason that the Attorney General did not offer a policy-based rationale that could

¹⁸⁰ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 858 (1984).

¹⁸¹ *Id.*

¹⁸² *Id.* at 863–65 (describing the EPA's bubble-concept approach to "stationary source" as "a reasonable accommodation of manifestly competing interests").

¹⁸³ *Id.* at 859–64.

¹⁸⁴ 546 U.S. 243 (2006).

¹⁸⁵ *Id.* at 254 (quoting *Dispensing of Controlled Substances to Assist Suicide*, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306) (internal quotation marks omitted)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 258 (concluding that the Attorney General, although he has rulemaking authority under the CSA, "is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law"); *cf. id.* at 294 (Scalia, J., dissenting) (describing the majority's effort to use explicit delegation provisions in the CSA to cabin the Attorney General's authority as "at best, a fossil of our pre-*Chevron* era").

survive deferential review for reasoned decisionmaking. The interpretive rule's justifications were set forth in a memorandum authored by the Office of Legal Counsel (OLC).¹⁸⁸ As one would expect from a memo generated by the lawyers of the OLC, much of the discussion is devoted to review of authority, notably including Supreme Court case law, but also including the views of medical associations such as the American Medical Association.¹⁸⁹

The memo's "policy" analysis is scant. It does mention the valid concern that physician-assisted suicide might lead to coerced deaths, especially among vulnerable populations such as the poor and disabled.¹⁹⁰ Certainly, this point was a "relevant factor" appropriate for analysis. The memo does not, however, assess other obvious points of discussion, such as the suffering that the ODWDA was designed to alleviate, or its protections against coercion. Moreover, although the CSA allocates regulatory authority both to the Attorney General and to the Secretary of Health and Human Services, with the latter in charge of medical judgments, the interpretive rule provided no indication of any consultation with the Secretary at all.¹⁹¹

Given these obvious gaps, the justification for the interpretive rule plainly did not amount to reasoned decisionmaking in policy terms and would fail step one*. The Attorney General's rationale was, in essence, a legal brief, containing the types of information that courts can assess as well (or better) as anyone else.¹⁹² As the Attorney General had not offered a reasoned policy analysis, he had no grounds for claiming *Chevron* deference rooted in agency policymaking competence.

B. Making the Doctrine Better Reflect How Policy Should Inform Meaning

Another advantage of reversing the steps is that this order would better reflect how policy concerns and statutory meaning should interrelate in close cases. As currently framed, the *Chevron* two-step invites courts to deploy independently the "traditional tools of statutory construction" to determine Congress's "clear" intent before focusing on agency policy analysis.¹⁹³ Determining the "clear" limits imposed by Congress can

¹⁸⁸ Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. at 56,608 (describing opinion of the OLC as the "legal basis" for the interpretive rule).

¹⁸⁹ See generally Whether Physician-Assisted Suicide Serves a "Legitimate Medical Purpose" Under DEA Regulations, 25 Op. O.L.C. 135 (2001), available at <http://www.justice.gov/olc/2001/suicide-mem.pdf>.

¹⁹⁰ *Id.* at 148.

¹⁹¹ See *Gonzales*, 546 U.S. at 243, 253–54 ("On November 9, 2001, without consulting Oregon or apparently anyone outside his Department, the Attorney General issued an Interpretive Rule announcing his intent to restrict the use of controlled substances for physician-assisted suicide.").

¹⁹² See *id.* at 257 (stating that the Attorney General's interpretive role "cannot be considered an interpretation of the regulation" because it was merely a "paraphrase [of] the statutory language").

¹⁹³ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (instructing courts to check first whether Congress "has spoken to the precise question at issue")

be a fuzzy exercise, however, as evidenced by five to four Supreme Court decisions splitting on whether an agency statutory construction failed at step one.¹⁹⁴ Given the fuzzy nature of statutory construction, it makes sense for courts to consider how an agency thinks its enabling act *should* be implemented as they determine how Congress *wanted* it to be implemented.

Justice Breyer seems to have had this point strongly in mind when he authored the lead opinion in *Zuni Public School District No. 89 v. Department of Education*.¹⁹⁵ A large federal government presence in a school district can adversely affect its tax base.¹⁹⁶ To address this problem, the Federal Impact Aid Program provides financial assistance to adversely affected districts.¹⁹⁷ It prevents states from making cuts that offset this aid unless the Secretary of Education determines that the state program “equalizes expenditures” among districts.¹⁹⁸ This equalization inquiry requires the Secretary to determine per-pupil expenditures in the various districts.¹⁹⁹ As part of the process, the Secretary is to exclude outliers, “disregard[ing] local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.”²⁰⁰

A good case can be made that the most natural (but context-free) reading of this statutory language requires a ranking of school districts in order of per-pupil expenditures followed by exclusion of ten percent of the *districts* (evenly split between top and bottom).²⁰¹ Under a thirty-year-old regulation, however, the Department of Education

before examining whether the “agency’s answer is based on a permissible construction”). For an example of a court construing *Chevron* as forbidding reliance on agency policy views at step one, see, e.g., *Mylan Pharmaceuticals, Inc. v. FDA*, 454 F.3d 270, 274 (4th Cir. 2006) (“At the first step a court focuses purely on statutory construction without according any weight to the agency’s position.”).

¹⁹⁴ See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 82 (2007) (holding five to four that a Department of Education regulation did not violate clear statutory language); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 120 (2000) (holding five to four that the Food and Drug Administration’s assertion of jurisdiction to regulate tobacco violated clear congressional intent). There is something vaguely comic, or at least ironic, about five to four splits on “clear” meaning.

¹⁹⁵ 550 U.S. 81 (2007) (Breyer, J., plurality). For another path for ensuring that agency views inform the beginning of *Chevron* analysis rather than its end, see Strauss, “*Deference*” *Is Too Confusing*, *supra* note 7, at 1165 (explaining that courts should apply *Skidmore* “weight” at *Chevron* step one); Michael Herz, *Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in *A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES* 125, 142–43 (John F. Duffy & Michael Herz eds., 2005) (contending that “*Skidmore* should apply within step one”).

¹⁹⁶ *Zuni*, 550 U.S. at 84–85.

¹⁹⁷ *Id.* at 84.

¹⁹⁸ *Id.* at 85.

¹⁹⁹ *Id.*

²⁰⁰ 20 U.S.C. § 7709(b)(2)(B)(i) (2006).

²⁰¹ Certainly that is what the four-Justice dissent, led by Justice Scalia, thought. *Zuni*, 550 U.S. at 108 (Scalia, J., dissenting). He described the majority’s rejection of this reading as “nothing other than the elevation of judge-supposed legislative intent over clear statutory text.” *Id.*

(DOE) instead excludes the number of districts necessary to remove ten percent of the *student population* from the calculations.²⁰² For instance, suppose that a state had a student population of one million and one hundred school districts. The richest and the poorest districts by per-student expenditure are huge, each having 50,000 students. In that case, the DOE's regulation would exclude just these two districts, which include ten percent of the student population, from its calculations. Ninety-eight percent of the *districts* would remain in the count.

A person lacking any understanding of the agency's rationale might be inclined to reject its statutory construction. Responding to this problem, Justice Breyer's lead opinion self-consciously focused on the Secretary's policy explanation (as well as on legislative and regulatory history) for "illumination" before turning to later discussion of the "literal language."²⁰³ Both history and policy concerns provided strong support for the Secretary. The implementing regulation was long-standing, a plausible case could be made for congressional ratification, and the Secretary even had a hand in drafting the statutory provision at issue.²⁰⁴ More to the present point, the policy goal underlying the ten percent exclusion is to remove uncharacteristic outliers from calculations designed to foster equal treatment of students.²⁰⁵ Due to variations in school district size across and within states, excluding ten percent of *districts* from the calculation is an exceptionally stupid and inconsistent way to accomplish this goal; excluding districts sufficient to account for ten percent of the *student population* is far more sensible.²⁰⁶

Thus armed, Justice Breyer turned to the statute's "literal language" and found an escape route by distinguishing between ranking characteristics and populations.²⁰⁷ The exclusions at the ninety-fifth and fifth percentile levels required creation of a distribution of some population ranked according to some criterion.²⁰⁸ The statute made clear that this ranking criterion was average per student expenditures by district.²⁰⁹ The statute did not, however, tell the Secretary what population to rank—e.g., the Secretary might rank districts in order of spending, students in order of money spent upon them, etc.²¹⁰ This silence, along with other contextual factors, created an ambiguity that allowed the Secretary (sensibly) to choose to rank the students rather than districts.²¹¹ The effect of

²⁰² *Id.* at 86 (majority opinion).

²⁰³ *Id.* at 89–90.

²⁰⁴ *Id.* at 90–91; *cf. supra* Part I.B (discussing pre-*Chevron* law extending deference to long-standing, consistent statutory constructions).

²⁰⁵ *Zuni*, 550 U.S. at 91.

²⁰⁶ Justice Breyer's characterization was more polite. *See id.* ("Finally, viewed in terms of the purpose of the statute's disregard instruction, the Secretary's calculation method is reasonable, while the reasonableness of a method based upon the number of districts alone (*Zuni*'s proposed method) is more doubtful.").

²⁰⁷ *Id.* at 95–96.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 96.

²¹⁰ *Id.* at 96–97.

²¹¹ *Id.*

this choice was to exclude ten percent of the student population rather than ten percent of total districts.

Six Justices expressed alarm over Justice Breyer's examination of the Secretary's policy rationale before focusing on the statutory text. Justice Scalia, writing for a four-Justice dissent, decried "a most suspicious order of proceeding," contravening immense amounts of case law declaring "[w]e begin, as always, with the language of the statute."²¹² He condemned Justice Breyer's statutory interpretation saving the regulation as "sheer applesauce" that violated the plain language of the statute.²¹³

Concurring with the lead opinion, Justice Kennedy, joined by Justice Alito, agreed that the statutory text was ambiguous and left room for *Chevron*.²¹⁴ The concurrence had misgivings about how Justice Breyer reached this conclusion, however:

The opinion of the Court . . . inverts *Chevron*'s logical progression. Were the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes. It is our obligation to set a good example; and so, in my view, it would have been preferable, and more faithful to *Chevron*, to arrange the opinion differently.²¹⁵

Justice Kennedy thus squarely rejected this Article's thesis that the ordering of the *Chevron* two-step should be reversed. His stated concern was that reversing the order would create the "impression" that courts are not giving due weight to "traditional tools of statutory construction."²¹⁶ Perhaps, however, he was also concerned that putting agency policy explanations at the front and center of the *Chevron* inquiry would give these explanations too much weight as a matter of substance as well. This objection does not seem persuasive, however, given that, even with the steps reversed, a court affirming an agency pursuant to *Chevron* would still need to explain how the agency's construction squares with some reasonable understanding of the underlying statutory language. One would think that this constraint of reasoned explanation would suffice to keep courts and agencies within the bounds of reason, as it were.

That said, it does make sense to suppose that a judge who appreciates that an agency has a reasoned policy justification for its statutory construction might look harder than she otherwise would for reasons to affirm. This effect, however, is perfectly appropriate, as *Zuni* illustrates. Five Justices thought the agency's construction fell within a zone of ambiguity;²¹⁷ the four dissenting Justices thought the construction

²¹² *Id.* at 109 (Scalia, J., dissenting).

²¹³ *Id.* at 113.

²¹⁴ *Id.* at 107 (Kennedy, J., concurring).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 99 (majority opinion).

violated clear statutory meaning and characterized contrary efforts as interpretive “applesauce.”²¹⁸ It is easy to imagine that this close decision might have come out the other way at current *Chevron* step one if the majority had not first taken the time to understand the policy grounds motivating the agency. This result would have been unfortunate, as it is difficult to see what public interest would have been served by deploying uninformed “plain language” to throw out a sensible, thirty-year-old system for excluding statistical outliers in a program designed to equalize spending on students.

C. Diffusing Two Objections

Before closing, this Article will try to diffuse two objections that come readily to mind to reversing the order of the *Chevron* two-step. The first is that this flip might require needless work from reviewing courts in cases where determining the rationality of an agency’s policy analysis at step one* is hard but determining that the agency has violated clear congressional intent at step two* is easy. This objection can draw weight from the perception that judicial review of agency policy choices, especially in its “hard look” form can be quite demanding.

A bit of flexibility can diffuse this objection, however.²¹⁹ As a threshold point, there are many cases where review for reasoned decisionmaking is straightforward and easily accomplished—as the *Chevron* decision itself demonstrated.²²⁰ Also, it should not take much time or energy for a reviewing court at least to identify the policy benefits that an agency claims for its preferred statutory construction. Suppose, after doing so, a court concludes that assessing the validity of the agency’s supporting reasoning would be difficult but that the agency likely violated clear congressional intent in any event. In such a case, the court could avoid wasting time by simply assuming for the sake of argument that the agency’s policy justification would survive review for reasoned decisionmaking. This approach would enable courts to dispose quickly of agency statutory constructions where the agency’s policy justification, even if perfectly valid and true, cannot disguise a plain violation of congressional intent.

The second objection involves preserving agency authority to use *Chevron* power to trump some judicial precedents. One of the purported benefits of *Chevron* deference is that limiting courts to rationality review allows agencies to change interpretive course based on new learning and evolving values.²²¹ Judicial stare decisis norms do not

²¹⁸ *Id.* at 113 (Scalia, J., dissenting).

²¹⁹ *Cf. Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1403 (2013) (Breyer, J., concurring) (“That is to say, ‘the standard doctrines of administrative law . . . should not be taken too rigidly.’” (quoting Louis Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966))).

²²⁰ See *supra* notes 97–102 and accompanying text (discussing the Supreme Court’s quick review of the EPA’s policy justification for applying the “bubble concept” to “stationary sources”).

²²¹ See, e.g., *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 742 (1996) (explaining that an agency change to a statutory construction “is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency”); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64

generally interfere because a holding that an initial agency construction is reasonable does not necessarily contradict a later holding that a different agency construction of the same language is also reasonable. Where *Chevron* deference does not apply, however, courts choose the statutory constructions they deem best.²²² If a court holds that a particular statutory construction is the best available, one might expect the usual operation of stare decisis to block that court from later accepting a different statutory construction.²²³

The tension between *Chevron* and stare decisis became acute where courts construed statutory language in agency enabling acts before the relevant agencies got around to adopting constructions eligible for *Chevron* deference.²²⁴ If the stare decisis effects of the judicial constructions controlled, then agencies would lose their *Chevron* power to choose among reasonable constructions. It would be passing strange, however, for the existence of *Chevron* authority to depend on whether a court or an agency adopted the first authoritative statutory construction.²²⁵

In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court resolved this tension by holding that *Chevron* beats stare decisis.²²⁶ More specifically, an agency's *Chevron*-eligible statutory construction can trump an earlier judicial statutory construction unless the court's opinion makes clear that its construction "follow[ed] from the unambiguous terms of the statute and thus [left] no room

(1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.").

²²² See *supra* Part I.A (discussing *Skidmore* deference).

²²³ See *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (stating his view that once a court applies *Skidmore* to choose a statutory construction, "it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed").

²²⁴ See *id.* (contending that the Court's *Mead* decision worsened this problem by expanding the range of agency statutory constructions subject to *Skidmore* rather than *Chevron* review). For academic discussions of this problem, see, for example, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1273–76 (2002) (proposing that a court's construction of an agency statute be regarded as a "provisional precedent" subject to the agency's later exercise of *Chevron* authority); Paul A. Dame, Note, *Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 435–36 (2002) (arguing that judicial constructions of agency statutes pursuant to *Skidmore* should be regarded as "persuasive dicta" and that agencies should be able to use their *Chevron* authority to trump judicial precedents). See generally Murphy, *A "New" Counter-Marbury*, *supra* note 6 (analogizing *Skidmore* review to hard-look review to develop argument that earlier judicial statutory constructions should not control later review of agency statutory constructions that offer new, *Chevron*-eligible rationales).

²²⁵ See *Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (castigating the majority for developing a framework that would make *Chevron* eligibility depend on whether a court or an agency issued an authoritative statutory construction first).

²²⁶ 545 U.S. 967, 982–83 (2005).

for agency discretion.”²²⁷ To justify allowing agencies to trump judicial statutory constructions, the Court turned to its trusty implicit delegation story. A Congress that wants agencies to have *Chevron* authority certainly would not want its existence to depend on accidents of timing.²²⁸ Also, depriving agencies of interpretive flexibility by binding them with judicial constructions would “ossify” the law, which would be bad.²²⁹ Thus, Congress must want *Chevron* to beat stare decisis.

If courts abandon the implicit delegation story, to avoid the silliness of *Chevron* authority depending on decisional order, they would need to develop some other justification for allowing agencies to sometimes trump courts. It is not hard, with the right will, to devise one. The stare decisis norms of the federal courts are not absolute, and they have evolved over time.²³⁰ The Supreme Court, for instance, declares itself free to overrule its own precedents provided it has a good enough reason.²³¹ One accepted type of reason for overruling a precedent is significant change in circumstances.²³² Along these lines, courts could acknowledge that a new agency construction supported by a reasoned policy analysis provides a type of changed circumstance that justifies revisiting an earlier judicial statutory construction. This stance would be in perfect keeping with *Skidmore*’s insistence that courts owe respect to explanations agencies give for their statutory constructions.

Of course, one advantage of this approach—or some variation on it—is that it is more honest and direct than the implicit delegation story. Agencies can trump judicial constructions of agency enabling acts because the Supreme Court thinks this power is a good idea. It may as well say so.

CONCLUSION

Just as Professor Koch advised, judicial deference to agency decisions should track the distinction between law and policy.²³³ Courts are in charge of determining the law;

²²⁷ *Id.* at 982.

²²⁸ *Id.* at 983 (“Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.”).

²²⁹ *Id.*

²³⁰ *See, e.g.,* *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))).

²³¹ *See, e.g.,* *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (noting that the Court requires a “special justification” for departing from precedent); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863–64 (1992) (per curiam) (observing that overruling a precedent requires “some special reason” beyond the judge’s view that the precedent was incorrect).

²³² *See, e.g.,* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534–35 (2009) (Thomas, J., concurring) (noting that “dramatic changes in factual circumstances” can support overruling precedent); *Casey*, 505 U.S. at 855 (noting that a change in facts or how they are viewed can “rob[] [an] old rule of significant application or justification”).

²³³ Koch, *supra* note 1, at 983–84.

they should defer to the policymaking decisions of Congress and of agencies acting within their spheres of authority. *Chevron* is best understood as applying this distinction to the borderline problem of judicial review of an agency's construction of a statute it administers. Under the current ordering of the two-step, courts inquire into Congress's clear intent at step one and then check the agency's justification for its choice at step two.²³⁴ This ordering has helped make the *Chevron* doctrine harder and more confusing than it needs to be. Waiting until step two to investigate the agency's rationale obscures that the core justification for *Chevron* deference should be judicial respect for agency expertise—i.e., agencies should know their policymaking business better than the courts. Failing to give due emphasis to this point, the Supreme Court has wasted its energy (and that of many courts and litigants) hunting for the precise contours of Congress's implicit (i.e., fake) delegations of *Chevron* authority to agencies. Also, if courts do in fact wait until step two to explore an agency's rationale, they run the risk of depriving themselves of information that may usefully illuminate statutory meaning.

An easy way to solve these problems would be to put the best justification for *Chevron* deference—agency policy competence—at the front and center of the *Chevron* doctrine by reversing the order of the two-step. At step one*, the reviewing court would ask whether the agency has offered a policy justification for its choice that satisfies reasoned decisionmaking. By doing so, an agency demonstrates that it is basing its choice on tools that it understands better than the court, which triggers *Chevron* deference with no step zero required. If the agency has offered a reasoned policy rationale, then at step two*, the reviewing court would check whether the agency's construction is consistent with a reasonable understanding of congressional policies embedded in statute. Simple, really. Or simpler, anyway.

²³⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).